

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1**

BAXTER ACADEMY FOR TECHNOLOGY AND SCIENCE

EMPLOYER

and

CASE 01-RC-239165

MAINE EDUCATION ASSOCIATION

PETITIONER

**BAXTER ACADEMY'S REQUEST FOR REVIEW OF THE
REGIONAL DIRECTOR'S MAY 3, 2019 DECISION AND DIRECTION OF ELECTION**

INTRODUCTION

Baxter Academy for Technology and Science submits this Request for Review of the May 3, 2019 Decision and Direction of Election issued by the Acting Regional Director of Region 1 of the National Labor Relations Board. On February 4, 2019, the Board issued an Order Granting Review in Part and an Invitation to File Briefs in the matter of *Kipp Academy Charter School*, Case No. 02-RD-191760. In that Order, the Board requested briefs by the parties and *amici* on the question of whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) of the Act.

Because the deadlines for filing briefs on this issue in the *Kipp Academy Charter School* matter have closed, Baxter Academy understands that the Board is likely to make a determination in the near future on the question of whether the Board elects to decline jurisdiction over charter schools. Baxter Academy respectfully submits that the Board should decline jurisdiction over charter schools, including Baxter Academy, for the reasons set forth in

former Board Chair Miscimarra’s dissent in the *Hyde Leadership Charter School – Brooklyn* case, as well as for the reasons set forth in the briefs submitted in the *Kipp Academy Charter School* matter by the United Federation of Teachers, Local 2, AFL-CIO and by the *amici* who have advocated in favor of the Board declining jurisdiction over charter schools as a class.

ARGUMENT

The Board Should Decline to Assert Jurisdiction over Charter Schools as a Class

The Board has the discretion to “decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of jurisdiction.” *See* 29 U.S.C. § 164(c)(1). In his dissent in *Hyde Leadership*, then-Board Chair Miscimarra found that charter schools “have an insubstantial effect on interstate commerce.” *See Hyde Leadership Charter School – Brooklyn*, 364 NLRB No. 88 (2016) at 9-10 (Miscimarra in dissent). Baxter Academy submits that the Board should decline jurisdiction over charter schools established in Maine and other states, including Baxter Academy, on the ground that they have an insubstantial effect on interstate commerce.

The Board has declined to assert jurisdiction over operations that are traditionally local in nature. For example, the Board has declined to exercise its jurisdiction over the horse racing and dog racing industries. *See Jefferson Downs, Inc.* 125 NLRB 386 (1959); *Hialeah Race Court, Inc.*, 125 NLRB 388 (1959); *Los Angeles Turf Club*, 90 NLRB 20 (1950); *see also* 29 C.F.R. § 103.3. In codifying its practice in 29 C.F.R. § 103.3, the Board emphasized state control over these industries, involve licensing and supervision through administrative agencies. 38 Fed. Reg. 9537 (April 1973). Similar to those industries, Baxter Academy is closely regulated by administrative arms of the State of Maine, including the Maine Charter School Commission and the Maine

Department of Education. *See* 20-A M.R.S. Chapter 112. Both the Maine Charter School Commission and the Maine Department of Education have adopted regulations governing charter schools. Moreover, Baxter Academy has entered into a detailed charter contract with the Maine Charter School Commission that closely regulates its operations.

In cases declining jurisdiction over the horse and dog racing industries, the Board determined that “racetrack operations are essentially local in nature,” and that declining jurisdiction “[would] not leave the labor relations of such operations unregulated.” *Hialeah Race Court, Inc.*, 125 NLRB at 390. In this case, the State of Maine has regulated charter school labor relations in its public charter school law. The Maine public charter school law provides as follows with respect to labor relations:

Teachers at a public charter school may choose to bargain collectively in accordance with this paragraph.

(1) Teachers who are employees of the public charter school have the same rights as other teachers in public education to organize and bargain collectively. Bargaining units at the public charter school must be separate from other bargaining units, such as a district bargaining unit. Staff at noncharter public schools converting to public charter schools have a right to employment benefits as stated in applicable collective bargaining agreements or they may vote to be represented in alternative ways.

(3) Teachers who are employees of the public charter school may not be required to be members of any existing collective bargaining agreement between a school administrative unit and its employees. A public charter school may not interfere with civil service laws or other applicable rules protecting the rights of employees to organize and be free from discrimination.

20-A M.R.S. §2412(6)(C). Former Board Chair Miscimarra also noted in his dissent in *Hyde Leadership* that by declining jurisdiction, “the Board would permit state and local governments to regulate charter school labor relations” 346 N.L. R. B. No. 88 at 10.

Finally, the policy reasons for declining jurisdiction over charter schools cited by Board Chair Miscimarra in his *Hyde Leadership* dissent weigh strongly in favor of a decision by the

Board to decline jurisdiction over charter schools. Chair Miscimarra outlined those policy reasons in detail in that dissent:

I fully support the protection afforded by our statute to employees, unions, and employers who are subject to the Act. For several reasons, however, I believe our efforts to assert jurisdiction over charter schools will be self-defeating and will operate to the substantial detriment of the parties in many or most cases.

First, the Board can only choose to exercise jurisdiction over charter schools in those cases where Section 2(2) jurisdiction exists, and this means the Board will not even have the option of exercising jurisdiction when charter schools qualify as “political subdivisions” of a state under the Hawkins County test described and applied above. The result of Board efforts to assert jurisdiction over charter schools will be a jurisdictional patchwork--where federal jurisdiction exists here and state jurisdiction exists there, depending on how the “political subdivision” question is resolved--with substantial uncertainty for employees, unions, employers, and state and local governments.

Second, one of the Board’s primary roles is to foster “stability of labor relations,” and the policy underlying our statute is to produce a “single, uniform, national rule” displacing the “variegated laws of the several States.” Declining to exercise jurisdiction is the only way that the Board can foster stability, certainty and predictability in this important area. Based on the fact-specific inquiry required under Hawkins County, there is no way for parties to reliably determine, in advance, whether or not Section 2(2) jurisdiction exists, and this uncertainty will persist given the length of time that it takes to obtain a Board determination regarding Section 2(2) jurisdiction, not to mention the uncertainty associated with potential court appeals from any Board decision. Therefore, the only certain outcome of the Board’s attempted exercise of jurisdiction here and in other charter school cases will be substantial uncertainty and long-lasting instability.

Third, the instant case and Pennsylvania Virtual illustrate these problems. Here, New York law gives charter school employees the right to form a union and bargain under the New York Public Employees’ Fair Employment Act, and the New York’s Public Employment Relations Board (PERB) decided in 2011 that it has jurisdiction over New York charter schools. After the PERB decision was upheld by a state trial court, a further appeal to the Appellate Division of the New York Supreme Court was held in abeyance after an NLRB majority in Chicago Mathematics asserted jurisdiction over the charter school in that case. In 2013, the Appellate Division stayed the PERB appeal indefinitely “pending a determination of the NLRB whether the NLRA applies to the collective bargaining matters herein at issue and thus preempts PERB’s jurisdiction.” In 2014, however, the Supreme Court’s Noel Canning decision resulted in the invalidation of the NLRB’s decision in Chicago Mathematics, and even if Chicago Mathematics had not been invalidated, it would not control the jurisdictional determination here, which depends on the particular facts presented in this case. In sum, the Board’s efforts to assert jurisdiction over charter schools have produced years of uncertainty regarding the applicability of federal law, and employees have been denied years of protection they would otherwise have had under New York state law. The NLRB’s efforts to exercise jurisdiction over charter schools produced

a similar sequence of events in Pennsylvania Virtual, where for years, employees, unions and employers have been denied the protection of Pennsylvania state law regarding union representation and collective bargaining.

Finally, charter schools remain relatively new, and the states--along with local governments and school districts--have been laboratories for experimentation. Based on the approach embraced by my colleagues today, employees concerned about their working conditions will not know what set of rules apply to them or to whom to turn if the employer infringes on their rights, and employees are likely to face years of delay if they try to secure relief from the NLRB. Unions and employers will have difficulty understanding their respective rights and obligations, given the uncertainty about whether federal, state, or local laws apply. Most poorly served will be the students whose education is the primary focus of every charter school. In most instances, the likely result will be protracted disputes that are not definitively resolved until many or most students (and many teachers and other employees) have come and gone.

For the reasons set forth above, I believe that the Board's effort to assert jurisdiction over charter schools is not likely to advance any policy goal under the National Labor Relations Act. Therefore, in my view, the Board should decline to exercise jurisdiction in this case and in other cases involving charter schools, even if Section 2(2) jurisdiction otherwise exists.

See Hyde Leadership Charter School – Brooklyn, 364 NLRB No. 88 (2016) at 9-10 (Miscimarra in dissent)(citations omitted). These policy reasons provide compelling justifications for the Board to decline jurisdiction over charter schools as a class.

CONCLUSION

For all the foregoing reasons, Baxter Academy respectfully requests that the Board grant the Request for Review.

Dated: June 6, 2019

Respectfully submitted,



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